Supreme Court, U.S.
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NO. 95 183

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1995 TERM

KAREN BRAZIL-BREASHEARS,
PETITIONER

v.

MICHAEL BILANDIC, CHARLES FREEMEN, JAMES HEIPLE, BENJAMIN MILLER, MARYANN MCMORROW, MOSES HARRISON, JOHN NICKELS, Justices of the Illinois Supreme Court and GEORGE CENAR, Director of Research Department, Illinois Appellate Court, Fist District
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Seventh Circuit

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THE QUESTION PRESENTED FOR REVIEW IS:

Whether respondents' political activities policy [rule], which bars petitioner and other state judicial employees from engaging in partisan and non-partisan public political speech and conduct, is overbroad and vague and violates petitioner's First Amendment rights?

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OFFICIAL REPORT OF OPINION

The opinion of the United Sates Court of Appeals for the Seventh Circuit sought to be reviewed and reversed, Karen Brazil-Breashears v. Michael Bilandic, Charles Freeman, James Heiple Benjamin Miller, Maryann McMorrow, Moses Harrison, John Nickels, Justices of the Illinois Supreme Court and George Cenar, is officially reported in 53 F. 3d 789 (1995).

JURISDICTIONAL STATEMENT

I. The date of the entry of the judgment of the Court of Appeals affirming the district court's dismissal of petitioner's complaint, which is sought to be reviewed and reversed, was April 19, 1995.

II. Petitioner's Petition for Rehearing was denied by the Court of Appeals on May 4, 1995.

III. Title 28 USC §1254(1), Rule 10(1)(6) of the Rules of the United States Supreme Court and Article 3 of the Constitution of the United States of America confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari.

THE CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States:

"Congress shall make no law...abridging the freedom of speech...".

The Fourth Amendment to the Constitution of the United States:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner filed a complaint for declaratory judgment, injunctive relief and a motion for a temporary restraining order requesting that the district court declare that the respondents' Political Activities Policy [Rule] violated petitioner's First Amendment right to speech, and to enjoin respondents from enforcing its said policy [rule]. Respondents filed a motion to dismiss petitioner's complaint on the ground that the complaint failed to state a claim for which relief could be granted. The district court granted respondents' motion to dismiss petitioner's complaint.

Petitioner filed an appeal contending that respondents' Political Activity Policy [Rule] was (1) unconstitutionally vague and overbroad in that it failed to give fair notice of the prohibited activity and barred partisan and non-partisan public political speech and conduct; (2) denied petitioner equal protection of the law; and (3) was not a resign-to-run rule. The Seventh Circuit affirmed the district court's dismissal of petitioner's complaint, but refused to address petitioner's claim that the respondents' policy [rule] unconstitutionally barred non-partisan political speech and conduct.

STATEMENT OF FACTS

Petitioner is a staff attorney of the Illinois Appellate Court, First District. Petitioner is also an active member and financial contributor to a non-partisan political organization which monitors non-partisan and partisan elections with volunteer trouble-shooters, election judges and poll watchers. Petitioner is a volunteer election monitor for partisan and non-partisan elections, and for twenty years, petitioner has

publicly supported partisan and non-partisan political candidates and ideas.

Respondents, Michael Bilandic, Charles Freeman, James Heipie, Benjamin Miller, Maryann McMorrow, Moses Harrison and John Nickels are Justices for the Illinois Supreme Court and have general supervisory authority over all Illinois Courts and Illinois court employees. Respondent, George Cenar, is the Director of the Research Department of the Illinois Appellate Court, First District, where petitioner is employed, and he is petitioner's immediate supervisor.

In September, 1993, petitioner circulated her petitions to become a candidate for judge of the Circuit Court of Cook County, Illinois in the Spring primary election. Shortly thereafter, respondents issued its Political Activities Policy [Rule] which barred all state judicial employees in the supreme, appellate and circuit courts from "(a) becom[ing] a candidate for nomination, or election to, or accept[ing] appointment to any public office; hold[ing] any office in or solicit[ing] funds for any political organization; or publicly

endors[ing], publicly oppos[ing], or solicit[ing] funds for candidates for public office." Any state judicial employee who engaged in the prohibited conduct would be fired.

Petitioner stopped circulating her petitions and other political activity and filed a complaint for declaratory judgment and injunctive relief requesting that respondents' policy [rule] be declared unconstitutional and respondents be enjoined from enforcing it. Petitioner alleged that the policy was overbroad and vague and violated the First Amendment because it barred partisan and non-partisan political speech and conduct; was not fairly subject to a limiting construction; did not give fair notice of the prohibited conduct; served no governmental interest; and violated the equal protection clause.

Respondents filed a Federal Rules 12(b)(6) motion to dismiss alleging that petitioner failed to state a claim for which relief could be granted in that the policy was not unconstitutionally vague, but was a resign-to-run-rule; and that respondents could restrict

petitioner from partisan political activity to serve the governmental interest in preserving the appearance of judicial impartiality. (Thereafter, respondents issued a memorandum which stated that respondents would issue a subsequent policy [rule] which would allow employees to take a leave of absence from their employment to participate in the prohibited conduct. However, respondents never issued any such amended Political Activities Policy [Rule].)

The district court denied petitioner's motion for a temporary restraining order and granted respondents' motion to dismiss. The district court found that the policy [rule] was not substantially overbroad or vague; that petitioner's candidacy for judge fell within the proscribed conduct; that the restriction on partisan political activity served the governmental interest of maintaining the appearance of judicial impartiality.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Respondents' Political Activities Policy [Rule[], which bars petitioner and all other state judicial employees from partisan and non-partisan public political speech and conduct, is overbroad and vague and violates petitioner's First Amendment rights.

The Seventh Circuit refused to address petitioner's claim that Respondents' Political Activities Policy [Rule] unconstitutionally barred petitioner and other state judicial employees from expressing non-partisan public political speech and engaging in non-partisan public political conduct.

The First Amendment does not prohibit governmental employers from restricting government employee's partisan political speech and conduct. [United Public Workers v. Mitchell, 330 US 75, (1947), United States Civil Service Comm'n v. National Assn'n of Letter Carrier, 413 US 548, (1973), and Broadrick v. Oklahoma, 413 US 601, (1973). The governmental interests in impartiality, efficiency and safeguarding employees from political coercion is served by certain

restrictions on partisan political conduct. (Letter Carriers, 413 US at 565-567.) However, this Court has implicitly found that the First Amendment does not permit these restrictions on non-partisan public political speech and conduct of government employees. (Mitchell, 330 US at 100; Letter Carriers, 413 US at 562.) Non-partisan political speech and conduct of government employees does not threaten governmental interests and thus has the full protection of the First Amendment. Arden v. Village of Oak Lawn, 537 F. Supp. 181, (1982).

The policy [rule] issued by respondents is unconstitutionally overbroad because it restricts non-partisan as well as partisan public political speech and conduct of state judicial employees. The overbreadth analysis should be applied to review the policy [rule] because no limiting construction may eliminate its unconstitutional inclusion of fundamentally protected speech and conduct. (Broadrick, 413 US at 613.) The policy [rule] prohibits public speech connected to any election, any political organization and any political candidacy, whether partisan or non-partisan. It

cannot be construed to apply only to partisan speech and conduct and it is thereby unconstitutionally overinclusive.

Furthermore, the policy [rule] does not contain any explanation to provide fair notice as to what particular act would constitute publicly endorsing or opposing a candidate, becoming a candidate or publicly soliciting funds for any political organization. Nor does the policy [rule] identify what is a political organization. If the policy [rule] is to be read as limited to prohibiting partisan political speech and conduct of state judicial employees, the Fourteenth Amendment requires that the policy be drafted with sufficient clarity to give fair notice of this proscription so that governmental employees will not be chilled from exercising First Amendment rights in non-partisan public political speech and conduct. Fire Fighters Association, District of Columbia v. Barry, 742 F. Supp. 1182, 1196, (D.D.C. 1990).

While petitioner's candidacy for judicial office may be constitutionally proscribed, the First Amendment may not be read to allow the same

prohibition regarding wearing a campaign button; posting a sticker on a bumper sticker; running for a local school council; or volunteering as an election monitor in a non-partisan political election. Letter Carriers, 413 at 575-578.

In measuring the substantiality of the overbreadth of the political activities policy [rule], the Court may balance the number of valid applications with the number of potentially invalid applications. [Magill v. Lynch, 560 F.2d 22, 30, (1977). Respondents' Political Activities Policy has innumerable constitutionally invalid applications. For the foregoing reasons, the petition for a writ of certiorari should be granted and respondents' policy [rule] should be declared unconstitutional and respondents enjoined from enforcing it.

Respectfully Prayed and Submitted:

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APPENDIX

OPINION

In the
United States Court of Appeals
For the Seventh Circut

No. 93-3954

Karen Brazil-Breashears,

Plaintiff-Appellant,

v.

Michael Bilandic, Charles Freeman, James Heiple, Benjamin Miller, Mary Ann McMorrow, Moses Harrison, John Nickels, Justices of the Illinois Supreme Court, and George Cenar,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 6589 -- **Ann Claire Williams**, *Judge.*

ARGUED October 31, 1994 -- DECIDED April 19, 1995

Before BAUER, KANNE, and ROVNER, *Circuit Judges.*

KANNE, *Circuit Judge.* On September 14, 1993, Karen Brazil-Breashears, a staff attorney for the Illinois Appellate Court for the First District, began

circulating a petition to enable her to be placed on the ballot for the March 15, 1994 primary election to the Circuit Court of Cook County. According to Brazil-Breashears' complaint, a number of co-workers assisted her in circulating petitions for her candidacy.

A couple weeks later, on October 1, 1993, the Supreme Court of Illinois issued an employment policy (the Policy) prohibiting all state judicial employees from engaging in a number of political activities. The Policy states:

> State-Paid Judicial Branch employees serving the Supreme, Appellate and Circuit Courts shall not:
>
> (1) become a candidate for nomination, or election to, or accept appointment to any public office;
>
> (2) hold any office on or solicit funds for any political organization; or
>
> (3) publicly endorse, publicly oppose, or solicit funds for candidates for public office.
>
> Any employee who engages in any of the above activity shall be deemed to have vacated his or her position and shall be discharged.

On November 18, 1993, the Policy was amended to allow employees to request to take an unpaid leave of absence to engage in political activities. Such request is not to "be unreasonably denied. A request for a leave of absence may, however, be denied if it would substantially interfere with operational needs of the Courts or the Administrative Office." Brazil-Breashears acknowledges in her compliant that the

policy was not instituted in direct response to her attempted candidacy.

George Cenar, Brazil-Breashears' direct supervisor, informed her of the Policy on October 4, and shortly thereafter, Brazil-Breashears and her co-workers ceased their efforts to place Brazil-Breashears on the March 15 primary ballot. Brazil-Breashears alleges she ceased her efforts because of the Policy. On October 23, 1993, Brazil-Breashears filed this lawsuit against the Justices of the Illinois Supreme Court and Cenar. The complaint alleges that the Policy unconstitutionally infringes her First Amendment right to free speech, violates her Fourteenth Amendment right to equal protection, and constitutes an improper *ex post facto* order.[1] Brazil-Breashears sought a Temporary Restraining Order (TRO) and asked that the policy be struck down.

The district court denied Brazil-Breashears' TRO and, in response to Defendants' 12(b)(6) motion, dismissed the complaint. We review *de novo* the district court's decision to dismiss Brazil-Breashears' complaint. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990).

First Amendment

We need not pause long on Brazil-Breashears' claim that the Policy unconstitutionally infringes her free speech rights. Brazil-Breashears wanted to run for elected office. Time and again, the Supreme Court and lower federal courts have upheld similar restrictions on the political activity of state employees.

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[1] Brazil-Breashears has not pursued this theory on appeal.

See, e.g., Clements v. Fashing, 457 US 957, 102 S.Ct. 2836, (1982); *Broadrick v. Oklahoma*, 413 US 601, 93 S.Ct. 2908, (1973); *Fletcher v. Marino*, 882 F.2d 605 (2nd Cir. 1989); *Krisher v. Sharpe*, 763 F.Supp. 1313 (E.D. Pa. 1991), *affirmed*, 944 F.2d 897 (3rd Cir. 1991). Recently, a judge on this court called the question of the propriety of resign-to-run-rules "settled doctrine". *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (Easterbrook, J. concurring).

The parties disagree on what level of scrutiny applies to this case. Brazil-Breashears claims that under *Eu v. San Francisco County Democratic Central Comm.*, 489 US 214, 109 S.Ct. 1013, (1989), this court should apply strict scrutiny, requiring that the governmental ends be compelling and the means be narrowly tailored to reach those ends. But *Eu* dealt with the constitutionality of state election laws. California had restricted the ability of political parties to endorse candidates in primary elections and mandated to certain internal workings of the parties. The associational rights of the political parties are fundamental rights, *Tashjian v. Republican Party of Conn.*, 479 US 208, 217, 107 S.Ct. 544, 550, (1986), whereas the right to candidacy is not, *Bullock v. Carter*, 405 US 134, 142-143, 92 S.Ct. 849, 855, (1972); *see also Citizens for John W. Moore v. Chicago Election Comm'rs*, 845 F.2d 144, 148 (7th Cir. 1988), and, therefore, some lesser level of scrutiny applies.

However, to say that the right to candidacy is not fundamental is not to say that a rational basis analysis applies. In *Citizens for John W. Moore*, this court noted that decisions of the Supreme Court in the area of First Amendment rights suggest "that courts should avoid putting decisions in terms of a 'standard review'." 845 F.2d at 1257. Defendants admit that "[w]hether such a policy violates the First Amendment has been traditionally dependent upon a balancing

test between the individual's First Amendment rights and the interests of the public body." We agree. Nonetheless, we find that the rather minor restriction imposed on Brazil-Breashears does not unconstitutionally infringe on her First Amendment rights. The State of Illinois has a substantial interest in maintaining the integrity of the judicial branch. The Policy serves this interest in that it enhances the efficiency of the workforce and prevents against actual, as well as the appearance of, impropriety. As the Supreme Court has noted, campaigning may tempt an employee to "devote less than [her] full time and energies to the responsibilities of [her] office," and "to render decisions and take actions that might serve more to further [her] political ambitions than the responsibilities of [her] office." *Clements*, 457 US at 968, 102 S.Ct. at 2846.

Brazil-Breashears additionally argues that, even if the Policy is constitutional as applied to her situation, it could be applied so as to unconstitutionally infringe others' First Amendment rights. The general rule is that one has no standing to raise the First Amendment rights of others. *See New York v. Ferber*, 458 US 747, 767, 102 S.Ct. 3348, 3360, (1982). However, The Supreme Court has held that if a statute is substantially overbroad, such that it "reaches a substantial number of impermissible applications", a court may strike down the law on its face, even if the rights of the plaintiff before the court were not violated. *Id.*, 458 US at 771, 102 S.Ct. at 3362. To support her claim that the Policy is overbroad, Brazil-Breashears catalogs a parade of horrors, hypothetical actions that she argues fall within the Policy's purview. Yet, the Supreme Court has already passed judgment on two of the entries in

her parade, finding their ban unobjectionable.[2] Others imagined by Brazil-Breashears seem to us so unlikely to be found to violate the Policy that we are willing to decide the issues on a case-by-case basis. *See Broadrick*, 413 US at 615-16, 93 S.Ct. at 2918 (holding that unless a statute is substantially overbroad, overbreadth can be handled on a case-by-case basis.)[3]

Equal Protection

Brazil-Breashears also argues that the Policy violates the Fourteenth Amendment's Equal Protection clause by restricting the political activities of employees but not of sitting judges. She claims that the vices that the Policy aims to prevent apply equally

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2 Brazil-Breashears fears that the Policy may ban circulating a petition for an individual to become a candidate for public office and managing a candidate's campaign. The Court has specifically held that the government *can* prevent its employees from engaging in these activities. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 US 548, 556, 93 S.Ct. 2880, 2886, (1973).

3 For example, Brazil-Breashears speculates that"[the policy] may prohibit state judicial employees from wearing a button bearing a candidate's image, or stating a slogan or name;" "driving or riding in a car bearing a bumper sticker which states a candidate's name or slogan;" "applauding a candidate at a public function;" and "expressing support or opposition for a candidate without seeking to influence others during a discussion with table mates in a restaurant."

to judges running for retention or election.[4]

Because employees of the judicial branch of the State of Illinois are not a suspect class and, as stated above, the right to run for office is not a fundamental right, the Policy need not only survive rational basis review. A number of reasons justify the Illinois Supreme Court's decision to apply the policy only to judicial employees and not to judges. More importantly, the government (in this case the Illinois Supreme Court) need not comprehensively attack an identified vice: it "must be allowed leeway to approach a perceived problem incrementally." *FCC v. Beach Communications, Inc.*, _____ US _____, _____, 113 S.Ct. 2096, 2102, (1993); *see also Smith v. Shalala*, 5 F.3d 235, 240 (7th Cir. 1993). This is true regardless of the probability that the government will ever address the rest of the problem.

Moreover, good reasons exist not to apply the Policy to sitting judges. First, requiring sitting judges to take a leave-of-absence in order to stand for retention[5] by the electorate would cause enormous

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[4] Under the Illinois Canons of Judicial Conduct, sitting judges are prevented from running for non-judicial office. Ill. S.Ct. R. 67. Thus the only disparity exists in the judges' ability to run for judicial office, which is also regulated by the canons. *Id.*

[5] Illinois re-elects sitting judges by a retention system. They must receive three-fifths of the elector's votes to be retained. This election is non-partisan. Ill. Const. art. VI, §12. Presumably, if the judge is not retained, he may run again for election at the end of his term.

We note that the canon governing the campaign conduct of sitting judges in the Illinois Code of Judicial Conduct applies equally to candidates for retention and candidates for election, Ill. S.Ct. R. 67(b)(1).

disruption in the judicial process. The tumult that would occur each election cycle by the absence of all sitting judges that decide to face the electorate would be much greater than the disruption that could occur by the more infrequent leave-of-absence of these judicial employees that decide to run for judicial office. The Illinois Supreme Court may have decided, correctly in our minds, that the costs associated with applying the Policy to sitting judges would greatly outweigh the benefits to be derived.

Additionally, allowing employees to run for judicial office could cause major disruption if the employee were to run against a sitting judge for whom he works. We have recently recognized this not insubstantial intra-office concern. *See e.g., Wilbur*, 3 F.3d at 218.

Other justifications for the policy may exist, but those listed are more than sufficient to uphold the policy against Brazil-Breashears' Equal Protection claim. The district court's dismissal of Brazil-Breashears' complaint is AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX

ORDER DENYING REHEARING

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 4, 1995.

Before

Hon. William J. Bauer, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

KAREN BRAZIL-BREASHEARS, Plaintiff-Appellant,	)	Appeal from the United States
NO. 93-3954 vs.	)	District Court for the Northern
MICHAEL BILANDIC, CHARLES FREEMEN, JAMES HEIPLE, BENJAMIN MILLER, MARY ANN MCMORROW, MOSES HARRISON, JOHN NICKELS, Justices of the Illinois Supreme Court, and GEORGE CENAR, Defendants-Appellees.	)	District of Illinois, Eastern Division.
	)	No. 93 C 6589
	)	Ann Claire Williams, Judge

ORDER

On consideration of the petition for rehearing filed in the above-captioned case, all of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.